Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1343

ARTHUR MITCHELL, ET AL,
Respondent,

VERSUS

MICHAEL BEAUBOUEF, ET AL
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARTHUR MITCHELL, ET AL,
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MICHAEL BEAUBOUEF, ET AL
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit which vacated and remanded the Judgment of the United States District Court for the Middle District of Louisiana which dismissed respondent's complaint.

CITATIONS TO OPINIONS BELOW

The Report of Magistrate Polozola in the United States District Court for the Middle District of Louisiana was unreported and is attached hereto as Appendix A, infra.

The Judgment Order of Judge West in the United States District Court for the Middle District of Louisiana was unreported and is attached hereto as Appendix B, infra.

The opinion of the United States Court of Appeals for the Fifth Circuit in the reported case of *Mitchell v. Beaubouef*, 581 F.2d 412 (5th Cir., 1978), is attached hereto as Appendix C.

JURISDICTION

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit is dated September 18, 1978. A Motion for Rehearing EnBanc was denied on December 1, 1978. The Judgment Order from the United States District Court for the Middle District of Louisiana is dated July 20, 1977. The Magistrate's Report from the United States District Court for the Middle District of Louisiana is dated July 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

The following questions are presented by this petition:

(1)What is the relationship between 28 U.S.C. §1915 (d) and the Federal Rules of Civil Procedure? Does 1915(d) modify the Federal Rules of Civil Procedure or does Federal Rules of Civil Procedure override 1915(d)?

(2) What procedure may a district court adopt, or what evidence may it consider to determine if a pro se inmate suit, filed in forma pauperis under 28 U.S.C. §1915(d)?

(3) If the district court's procedure in the present case does not conform to the Federal Rules of Civil Procedure, is it proper for a determination of frivolity or malice under 28 U.S.C. §1915(d)?

(4) May a district court hear evidence to determine if a pauper suit should be dismissed as frivolous or malicious under 28 U.S.C. §1915(d) before allowing the suit to proceed in accordance with the Federal Rules of Civil Procedure?.

(5) Can an inmate be required to exhaust his state administrative remedies where a state's administrative procedure such as the right of an inmate to appeal directly from the actions of a prison disciplinary board to the Director of the Department of Corrections is designed to protect an inmate's due process rights and correct any errors made by the disciplinary board?

(6) Where an inmate has the right to appeal a decision of a prison disciplinary board to the Director of the Department of Corrections is a civil rights suit under 42 U.S.C. §1983 ripe for adjudication if the appeal is pending or a rehearing granted to the inmate? As a corollary, when does a §1983 complaint concerning a disciplinary board hearing become ripe for adjudication?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved in this case are 42 U.S.C.

§1983 and 28 U.S.C. §1915(a) and (d). 42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. §1915(a) provides:

> "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

28 U.S.C. §1915(d) provides:

> "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or is satisfied that the action is frivolous or malicious."

STATEMENT OF FACTS

Plaintiffs, Arthur Mitchell, Gregory Robinson and William Birtha, have filed this suit pursuant to 42 U.S.C. §1983 against defendants, Michael

Beaubouef, David Carmena and R. H. Butler, Sr., claiming that the defendants denied plaintiffs a fair, impartial and procedurally correct disciplinary hearing. Plaintiffs are all incarcerated at Louisiana State Penitentiary at Angola, Louisiana, and all of the defendants were, at the time of the action complained of, correctional officers or officials at the Penitentiary. On February 1, 1977, plaintiffs were placed in lockdown status pending an investigation into charges that their activities were detrimental to security.

According to the report given the disciplinary board by R. H. Butler, Sr., Associate Warden for Custody, several confidential informants had indicated that the plaintiffs were making plans that would "endanger the lives of employees." Some of the confidential sources indicated that plaintiffs were planning an escape. In a further memorandum to the disciplinary board, Warden Butler preferred not to reveal the details of the confidential information, for fear of divulging the identity of the informants.

A disciplinary hearing was held on February 23, 1977. The members of the board was defendants, Michael Beaubouef, David Carmena, and an unnamed correctional officer or official. Defendant, R. H. Butler, Sr., did not sit on the board because he was the accuser in this matter. At the hearing, the three plaintiffs were found guilty as charged and transferred to permanent living assignments in maximum security lockdown.

Plaintiffs, through an inmate counsel substitute, filed a timely appeal to the Secretary of the Louisiana Department of Corrections charging several procedural violations. Any inmate who feels aggrieved by the decision of a disciplinary board has an automatic right of an appeal to the director from the decision of the board if that appeal is asked from within ten days of the disciplinary board's decision. The director then reviews not only all of the documentary evidence, but also the tape of the disciplinary hearing. The director then grants or denys the appeal.

While their appeal to the director was pending, plaintiffs on April 4, 1977, filed this suit in the

United States District Court for the Middle District of Louisiana pursuant to 42 U.S.C. §1983. Jurisdiction of the district court was invoked under 28 U.S.C. §1343. On that same day, the district judge allowed plaintiffs to proceed in forma pauperis pursuant to 28 U.S.C. §1915(a).

On April 5, 1977, the case was referred to United States Magistrate under 28 U.S.C. §636(b)(1)(b). The Magistrate, in accordance with a procedure devised by the district court and approved in *Michelli v. Henderson*, C.A. #74-296 (USDC-MD-LA, 1974), stayed further action in this suit. The Magistrate also ordered the complaint to be served upon the Louisiana Department of Corrections and for that department to submit to the court, within 60 days, a report concerning the circumstances surrounding the complaint.

In the meantime, the director, on June 23, 1977, granted plaintiffs' appeal and ordered the disciplinary board to hold a rehearing within two weeks of his decision. The rehearing was ordered because under prior decisions of the secretary, whenever a prisoner is charged on the basis of an incident report, such as from a confidential informant, the security representative is the accuser and must be summoned for cross-examination upon request. Since the plaintiffs specifically requested to cross-examination defendant Butler and the board had refused to allow the cross-examination the director felt that a reversible error had occurred.

On June 24, 1977, the administrative report was filed with the court. On July 14, 1977, the United States Magistrate issued a report to the judge recommending that the suit be dismissed without prejudice on the grounds that the present suit was premature. The Magistrate felt that since the new disciplinary hearing had been ordered and since the plaintiffs would have an opportunity to appeal that decision, it would be in the interest of justice to have the disciplinary hearing first resolved by the prison authorities. On July 20, 1977, a judgment was entered dismissing plaintiffs' suit.

Plaintiffs filed a timely appeal to the United States Fifth Circuit Court of Appeals. On September 18, 1978, a panel of that court, comprised

of Judges Coleman, Godbold, and Tjoflat reversed and remanded on the grounds that (1) the procedure used by the district court in obtaining an administrative report, violated the Federal Rules of Civil Procedure and (2) that the plaintiffs were not required to first exhaust their state administrative remedies. Defendants then filed a Motion for Rehearing which was denied on December 1, 1978.

REASONS FOR GRANTING WRITS

The decision of the Fifth Circuit Court of Appeal should be reviewed because:

1. The decisions reads 28 U.S.C. §1915(d) out of the law where a pro se inmate case filed in forma pauperis is involved;

2. This decision conflicts with other decisions of the Fifth Circuit concerning the adoption of special procedures to separate meritorious inmate claims from frivolous and malicious claims;

3. The decision of the Fifth Circuit conflicts with decisions from the Second, Seventh, and Ninth Circuits and;

4. Lastly the Fifth Circuit erred in overruling the district court's application of the doctrine of ripeness. This is an important issue of federal law because it involves the question of whether an inmate may short circuit a state's disciplinary procedure designed to insure that inmate of his due process rights in a prison disciplinary hearing.

Most suits filed by inmates under 42 U.S.C. §1983 are in proper person and in forma pauperis. This fact leads to an increasing burden on federal courts with the number of civil rights lawsuits being filed by prisoners. *Watson v. Ault*, 525 F.2d 886, (5th Cir., 1976). The ease with which inmates may file such suits substantially increases the chances of abuse of the judicial system since inmates generally have nothing to lose and everything to gain by filing such a suit. *Jones v. Bales*, 58 F.R.D 453 at 463 (N.D., GA., 1971) affirmed 480 F. 2d 805 (5th Cir., 1973).

The necessity for district courts to have greater discretion in separating meritorious claims from nonmeritorious claims where the suit is filed in forma pauperis is obvious. This is a rational

behind 28 U.S.C. §1915 (d). Congress clearly gave district courts power to exercise their discretion in these types of cases. Abuse of this discretion is reversible by the circuit courts.

However, the Fifth Circuit ruling goes much further than merely correcting an abuse of discretion. It flatly denies district courts the power to dismiss, under 1915(d), in forma pauperis suits filed by inmates in proper person. Furthermore, the Fifth Circuit requires that any dismissal of such suits be based on the four corners of the petition only or under the Federal Rules of Civil Procedure after service is made.

If this ruling of the Fifth Circuit is allowed to stand, 28 U.S.C. §1915(d) will be effectively read out of the law.

Defendants submit that the language of §1915(d) is specific and limits, to some extent, the Federal Rules of Civil Procedure. The questions to be answered by this court concerns the relationship between this statute and the Rules of Civil Procedure. Where does the effect of §1915(d) end and the Federal Rules of Civil Procedure take over? When can a district court dismiss a pro se inmate suit under §1915(d)? If it can dismiss a suit under this section, what procedure can it use and what evidence can it look at to determine if a suit is subject to dismissal? These questions are important issues of federal law which have never been resolved and must be resolved to affect an accommodation between the Federal Rules of Federal Procedure and 28 U.S.C. §1915(d).

Defendant's second reason for asking for the granting of the writ is because of the conflict between two lines of cases in the Fifth Circuit. Until this conflict is resolved and one or the other of the specific lines of cases are overruled, it is impossible for the district courts to know how far they may go and what procedures they may use in determining if an inmate suit is meritorious.

The first line of cases from the Fifth Circuit is *Willard v. United States*, 422 F.2d 810 (5th Cir., 1970); *Jones v. Bales*, 58 F.R.D. 453 (N.D., GA., 1972), affirmed, 480 F.2d 805 (5th Cir., 1973); *Dickinson v. Chief of Police*, 499 F.2d 336 (5th Cir., 1974); *Hardwick v. Ault*, 517 F.2d 295 (5th Cir., 1975); *Watson v. Ault*, 525 F.2d 886 (5th Cir., 1976); *Carter v. Thomas*, 527 F.2d 1332 (5th Cir., 1976); and *Hurst v. Phelps*, (No. 78-1178, unpublished, decided June 19, 1978). These cases not only approve, but encourage the use of judicially creative procedures to separate meritorious claims from the frivolous or malicious claims.

The second and conflicting line of cases, is *Ballard v. Spradley*, 557 F.2d 476 (5th Cir., 1977); *Rasberry v. Spradley*, 558 F.2d 257 (5th Cir., 1977); *Scott v. Estelle,567 F.2d 632 (5th Cir., 1978); Hurst v. Phelps*, (No. 78-1095, unpublished, decided September 8, 1978); and *Michell v. Beaubouef*, 581 F.2d 412 (5th Cir., 1978). This second line of cases hold that such judicially created procedures do not conform with the Federal Rules of Civil Procedure and cannot be used by the district courts to make a determination as to whether an inmate suit is or is not meritorious.

The conflict between these two lines of decision must be resolved so that district courts can know what procedures they may or may not adopt to facilitate the handling of inmate suits filed in forma pauperis.

In this case, the Fifth Circuit held that the appeal to the director was a state administrative remedy which the plaintiffs did not have to exhaust before filing this suit.

The Third, Sixth, Eighth and Tenth Circuits are in accord with this position. See, E.G., *United States ex rel Ricketts v. Lightcap*, 567 F.2d 1226 (3rd Cir., 1977); *McCray v. Burrell*, 516 F.2d 357 (4th Cir., 1975); *Jones v. Metzger*, 456 F.2d 854 (6th Cir., 1972); *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir., 1978); and *Gillette v. McNichols*, 517 F.2d 888 (10th Cir., 1975).

However, these decisions directly conflict with the decisions of the Second, Seventh, and Ninth Circuit Courts of Appeal.

The Second Circuit has steadily interpreted decisions of this court to mean that a wooden application of the exhaustion of administrative remedies' doctrines and cases under the civil rights act is to be condemned. But, where there is a viable administrative remedy, then exhaustion of administrative remedies may be required. *Eisen v.*

Eastman, 421 F.2d 560 (2nd Cir.. 1969, Cert. denied 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 75 (1970); *Blanton v. State University of New York*, 489 F.2d 377 (2d Cir., 1973); *Plano v. Baker*, 504 F.2d 595 (2nd Cir., 1974); *Fuentes v. Roher*, 519 F.2d 379 (2nd Cir., 1975).

The Seventh Circuit in *Secret v. Brierton*, 584 F.2d 823 (7th Cir., 1978) analyzed all of the cases dealing with the question of exhaustion of administrative remedies in civil rights cases. As a result of its analysis, the Seventh Circuit concluded that this Court had never stated that the exhaustion doctrine could never be applied in civil rights cases. The Court interpreted the decisions to mean that the exhaustion of administrative remedies had no applicability where those remedies are inadequate or their exhaustion would be futile.

The Ninth Circuit has reached a conclusion similar to that reached by the Second and Seventh Circuits. See *Whitner v. Davis*, 410 F.2d 24 (9th Cir., 1969); *Toney v. Ragan*, 467 F.2d 953 (9th Cir., 1972); and *Wagle v. Murray*, 546 F.2d 1329 (9th Cir., 1976).

Petitioners submit that the decisions of the various circuits are in such conflict that a resolution of this issue in a uniform standard concerning the question of exhaustion of state administrative remedies in civil rights cases is necessary and only this court can resolve this conflict.

Lastly, petitioners submit that the question of when a civil rights suit attacking the validity of a prison disciplinary board hearing is ripe for adjudication by a federal court is an important issue of federal law which this court must decide. The failure of this court to decide this issue would allow inmates to short circuit procedures set up by correctional officials to insure inmates receive due process disciplinary hearings. Without such a decision, correctional officials can never feel sure that the procedure that they have adopted would meet due process standards.

Petitioners submit that the appeal procedure established by the Louisiana Department of Corrections is so interrelated with the initial disciplinary hearing and due process requirments of *Wolfe v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d

935 (1974) that the action complained of by plaintiffs cannot be thought of as final or ripe for adjudication.

Petitioners submit that a decision by this court on the issue of ripeness is necessary to prevent cases of this type from being tried piece meal and to prevent the possibility of conflicting rulings being issued at the same time by a federal court

CONCLUSION

Petitioners submit that the magnitude of the conflict between decisions within the Fifth Circuit and the decision of the Fifth Circuit in this case and the decisions of the Third, Seventh, and Ninth Circuits as well as the important issues of federal law raised herein makes it necessary for this court to grant certiorari in this case.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
Attorney General

By:_____
ELLIS C. MAGEE
Executive Assistant Attorney General
P. O. Box 44005, Capitol Station
Baton Rouge, Louisiana 70804
Telephone: (504) 342-7013

Certificate of Service

I hereby certify that a copy of the above and foregoing petition for unit of certiorari has been placed in the United States mail, postage prepaid to plaintiff in proper person.

This_____day of February, 1979.

_____

ELLIS C. MAGEE

APPENDIX A

REPORT OF MAGISTRATE POLOZOLA IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
CIVIL ACTION NO. 77-95

ARTHUR MITCHELL, ET AL
Plaintiff,

VERSUS

MICHAEL BEAUBOUEF, ET AL
Defendant.

WEST, District Judge.

Appearances:
Arthur Mitchell
In Proper Person
Louisiana State Penitentiary
Angola, Louisiana 70712

J. Marvin Montgomery
Assistant Attorney General
Office of the Attorney General
P. O. Box 44005, Capitol Station
Baton Rouge, Louisiana 70804
(Attorney for Defendant)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Arthur MITCHELL,
Gregory Robertson,
William Birtha

Versus

Michael BEAUBOUEF,
David Carmena,
R. H. Butler, Sr.

CIVIL ACTION

NUMBER 77-95

MAGISTRATE'S REPORT

The petitioners, Arthur Mitchell, Gregory Robertson and William Birtha, have filed this suit pursuant to 42 U.S.C. §1983 against certain officials at the Louisiana State Penitentiary at Angola, Louisiana. Petitioners contend they were placed in administrative lockdown pending an investigation charging them with "causing problems on the big yard which would be detrimental to security." Thereafter, a hearing was held before the disciplinary board at the prison. Petitioners were found guilty and sentenced to lockdown. An appeal was then filed by petitioners with C. Paul Phelps, the Secretary for the Louisiana Department of Corrections. Secretary Phelps granted petitioners' appeal on various grounds, reversed the convictions and ordered a new hearing to be held within two weeks.

Petitioners contend their constitutional rights were violated as a result of the disciplinary hearing held in this case.

A review of the record in this case reveals that petitioners' constitutional rights were protected by the Secretary when he ordered a new hearing. Furthermore, there is absolutely no evidence of bad faith on the part of the board members who conducted the hearing. The board made a procedural error on an evidentiary matter which was later reversed by the Secretary. Since a new disciplinary hearing has been ordered and since the petitioners will have an opportunity to appeal that decision, the present suit is premature. It is this Court's opinion that it would be in the interest of justice to have the disciplinary hearing first resolved by the prison authorities.

RECOMMENDATION

It is my recommendation that petitioners' suit be dismissed, reserving to petitioners the right to refile this suit if they so desire and if necessary, following completion of the prison disciplinary proceedings and any appeal taken in connection therewith.

Baton Rouge, Louisiana, this 14th day of July, 1977.

UNITED STATES MAGISTRATE

APPENDIX B

JUDGMENT ORDER OF JUDGE WEST IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
CIVIL ACTION NO. 77-95

ARTHUR MITCHELL, ET AL
Plaintiff,

VERSUS

MICHAEL BBEAUBOUEF, ET AL
Defendant.

WEST, District Judge.

Appearances:

Arthur Mitchell
In Proper Person
Louisiana State Penitentiary
Angola, Louisiana 70712

J. Marvin Montgomery
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P. O. Box 44005, Capitol Station
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Arthur MITCHELL,
Gregory Robertson,
William Birtha

Versus

Michael BEAUBOUEF,
David Carmena,
R. H. Butler, Sr.

CIVIL ACTION

NUMBER 77-95

JUDGMENT

For the reasons stated in the Report of the United States Magistrate dated July 14, 1977, and filed in the record of this case:

IT IS ORDERED that plaintiffs' demands be, and they are hereby DENIED, and this suit is hereby DISMISSED.

Baton Rouge, Louisiana, July 20, 1977.

UNITED STATES DISTRICT JUDGE

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NUMBER 77-2656

ARTHUR MITCHELL, ET AL
Plaintiff-Appellant,

Versus

MICHAEL BEAUBOUEF, ET AL
Defendants-Appellees.

COLEMAN, GODBOLD AND TJOFLAT, Circuit Judges.

Appearances:

Arthur Mitchell
In Proper Person
Louisiana State Penitentiary
Angola, Louisiana 70712

J. Marvin Montgomery
Assistant Attorney General
Office of the Attorney General
P. O. Box 44005, Capitol Station
Baton Rouge, Louisiana 70804
(Attorney for Defendant)

Arthur MITCHELL, Gregory Robertson, and William Birtha, Plaintiffs-Appellants,

Versus

Michael BEAUBOULF et al., Defendants-Appellees.

No. 77-2656
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit

Sept. 18, 1978.

Three inmates of the Louisiana State Penitentiary filed a pro se complaint, alleging that they had been deprived of due process of law in a prison disciplinary hearing. After referring the complaint to a magistrate and receiving the magistrate's recommendation, the United States District Court for the Middle District of Louisiana, E. Gordon West, J., dismissed the suit with prejudice and, thereafter, granted leave to appeal in forma pauperis. The Court of Appeals held that : (1) the procedure whereby the case was summarily dismissed on the merits on the basis of an unverified administrative report submitted to the magistrate could not be countenanced, and (2) the prisoners' complaint stated a cause of action by alleging a denial of due process in a prison disciplinary proceeding.

Vacated and remanded.

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

1. Prisons 4(3)

Although Court of Appeals was sympathetic to problems of district courts in management of pro se prisoner litigation, procedure whereby state prisoners' pro se complaint was summarily dismissed on the merits on the basis of an unverified administrative report that was filed by defendants in compliance with a magistrate's order could not be countenanced; although such unverified administrative reports may aid the district court in framing the issues for trial or summary disposition, they cannot be used to circumvent summary judgment requirements. Fed. Rules Rules Civ. Proc. rule 56, 28 U.S.C.A.; 42 U.S.C.A. § 1983.

2. Federal Civil Procedure 2535, 2536

Under the summary judgment rule, factual statements should be submitted in affidavit forms; alternatively, they may be reduced to admissions through the invocation of, for example, Rule 36 or they may be made the subject of stipulation. Fed. Rules Civ. Proc. rules 36, 56, 28 U.S.C.A.

3. Federal Civil Procedure 2011

Procedure whereby magistrate makes factual determinations from evidence submitted in a manner not recognized by the Federal Rules of Civil Procedure clearly circumvents the letter and spirit of the Federal Rules. Fed. Rules Civ. Proc. rules 36, 56, 28 U.S.C.A.

4. Federal Civil Procedure 731, 1927

Where state prisoners' pro se civil rights complaint had been referred to a magistrate and the

magistrate had ordered that defendants submit an administrative report to the court, unverified administrative report that was thereafter submitted by defendants should have been treated at most as an answer to the inmates' complaint, thus setting the stage for further pretrial proceedings in which, once the issues had been delineated, it could be determined whether any factual issues remained to be litigated in a bench trial or, if either party demanded it, in a trial by jury.

5. Federal Civil Procedure 2734

Upon a showing of poverty by the prisoner, a prisoner's pro se complaint must be filed.

6. Prisons 4(2)

In the context of pro se prisoner litigation, it is appropriate that complaints be given an expansive reading.

7. Federal Civil Procedure 1781

A prisoner's pro se complaint should not be dismissed unless it appears beyond all doubt that the prisoner can prove no set of facts under which he would be entitled to relief.

8. Federal Civil Procedure 2734

If the district court cannot ascertain from a prisoner's pro se complaint whether the complaint states a claim on which relief can be granted, the questionnaire approved by the Fifth Circuit in *Watson v. Ault* may be used as a pleading auxiliary.

9. Federal Civil Procedure 411

If a prisoner's pro se complaint is deemed legally sufficient under the liberal standard appropriate to pro se prisoner litigation, process must be served on the defendant. Fed.Rules Civ. Proc. rule 4(a), 28 U.S.C.A.

10. Federal Civil Procedure 1877

A district judge may refer prisoner petitions challenging conditions of confinement to a magistrate. 28 U.S.C.A. § 636(b)(1)(B).

11. United States Magistrates 4

Where a prisoner petition challenging conditions of confinement is referred to a magistrate, the magistrate is authorized to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition of any pretrial motion, including motions for judgment on the pleadings, for summary judgment and for dismissal. 28 U.S.C.A. § 636(b)(1)(A, B).

12. Federal Civil Procedure 1836

Dismissal of a prisoner's pro se complaint for failure to state a cause of action should be without prejudice so that the inmate may file an amended complaint within a reasonable time.

13. Prisons 4(3)

In civil rights litigation challenging the conditions of prison confinement under the Civil Rights Act, a prisoner is not obligated to exhaust state administrative remedies. 42 U.S.C.A. § 1983.

14. Prisons 13(10)

Complaint wherein three inmates of Louisiana State Penitentiary alleged that they had been deprived of due process of law in a prison disciplinary hearing which resulted in their being sentenced to a "lock down" stated a claim upon which relief could be granted. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Middle District of Louisiana.

Before COLEMAN, GODBOLD, and TJOFLAT, Circuit Judges.

PER CURIAM:

Arthur Mitchell, Gregory Robertson, and William Birtha, inmates of the Louisiana State Penitentiary, filed a pro se complaint in the district court, alleging that they had been deprived of their constitutional rights in violation of 42 U.S.C. § 1983 (1970). The court below handled the complaint in conformance with a procedure devised to process prisoner civil rights claims and dismissed it on the merits. Because we find the court's procedure, we vacate the order of dismissal and remand the case for further proceedings.

The inmates' complaint alleged that they had been deprived of due process of law in a prison disciplinary hearing, which resulted in their being sentenced to a "lockdown." They sought injunctive relief and damages.

The district court ordered that the complaint be filed in forma pauperis and immediately referred it to a magistrate. The magistrate stayed the case pending the exhaustion of state administrative procedures and ordered review of the complaint by the Louisiana Department of Corrections in accordance with the district court's unreported decision in *Michelli v. Henderson*, No. 74-296 (M.D. LA. Nov. 27, 1974).[1] In accordance with *Michelli*, the Magistrate required that the defendants be served the complaint and that they submit an administrative report to the court within sixty days.

The defendants filed the administrative report within the allotted time. This unverified report stated that an administrative appeal had been granted in favor of the inmates and that a new, full hearing would be held. The inmates then moved for summary judgment, acknowledging that their administrative appeal had been granted but demanding damages for the allegedly unjust treatment they had already received.

On the basis of the unverified administrative report, the magistrate reported to the district judge that there was "no evidence of bad faith on the part of the board members" who conducted the first hearing, the subject of the inmates' complaint. Record at 42. The magistrate's report did not indicate whether he considered bad faith to be a necessary element of the inmates' cause of action or reasonable good faith to be an affirmative defense. In either event, the magistrate recommended that the complaint be dismissed without prejudice, reserving to the inmates the right to refile their complaint upon the completion of the

1. The district court's opinion in *Michelli* is set forth in appendix A. Also appended to this opinion, as appendices B and C, are the Magistrate's Report in *Michelli* and a memorandum from the Louisiana Department of Corrections, which detailed the procedures to be followed in handling prisoner complaints. The magistrate's order in the case before us refers to No. 74-296 as *Michelli v. Hunt*. We note here that the record in No. 74-296 is captioned throughout as *Michelli v. Henderson*.

new administrative hearings and any appeal that might follow. The district court dismissed the suit with prejudice, however, without the recommended reservation. Thereafter, it granted the inmates leave to appeal to this court in forma pauperis and certified that this appeal had been taken in good faith.

[1-4] Although this court is sympathetic to the problems of the district courts in the management of pro se prisoner litigation, *e.g.*, *Taylor v. Gibson*, 529 F.2d 709, 713 (5th Cir. 1976), we cannot countenance the use of the summary procedure utilized in this case. This case was summarily dismissed on the merits on the basis of the unverified administrative report submitted to the magistrate. Although we have recognized that such reports may aid the district court in framing the issues for trial or summary disposition, *see id.* at 717, they cannot be used to circumvent the summary judgment requirements of rule 56, Fed.R.Civ.P. *See Hardwick v. Ault*, 517 F.2d 295, 298 (5th Cir. 1975) (the Federal Rules of Civil Procedure apply to section 1983 cases). Under the rule, factual statements, such as the defendants' report, should be submitted in affidavit form, or they may be reduced to admissions through the invocation, for example, of rule 36, Fed.R.Civ.P., or they may be made the subject of stipulation. The procedure established by the district court in *Michelli*, however, where the magistrate apparently is authorized to make factual determinations from evidence submitted in a manner not recognized by the rules, clearly circumvents the letter and spirit of the federal rules. At most,

the defendants' report should have been treated as an answer to the inmates' complaint, thus setting the stage for further pre-trial proceedings in which, once the issues had been delineated, it could be determined whether any factual issues remained to be litigated in a bench trial, or, if either party demanded it pursuant to rule 38, Fed.R.Civ.P., in a trial by jury.

To the end that justice be done in these prisoner civil rights cases, we have outlined acceptable procedures in a series of opinions. *E. g.*, *Taylor v. Gibson; Watson v. Ault*, 525 F.2d 886 (5th Cir. 1976); *Hardwick v. Ault; Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972). They bear repeating in the context of this case.

[5-8] The complaint must be filed upon a showing of poverty by the prisoner. *Watson v. Ault*, 525 F.2d at 892. The court below did file the inmates' complaint in forma pauperis. The Federal Rules of Civil Procedure call for the liberal reading of complaints by district courts. An even more expansive reading is appropriate in the context of pro se prisoner litigation. Such a complaint "should not be dismissed unless it appears beyond all doubt that the prisoner could prove no set of facts under which he would be entitled to relief." *Taylor v. Gibson*, 529 F.2d at 714. *E. g. Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972); *Watson v. Ault*, 525 F.2d at 891-92. If the district court cannot ascertain from the complaint whether it states a claim upon which relief can be granted, the questionnaire approved in *Watson v. Ault* may be used as a pleading auxiliary. The complaint in the case

before us was filed on such a questionnaire form and clearly states a cause of action by pleading a denial of due process in a disciplinary hearing. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

[9-11] If the complaint is deemed legally sufficient under the liberal standard appropriate to this type of case, then service of process on the defendant, as was done here, is required pursuant to Fed.R.Civ.P. 4(a). *Watson v. Ault*, 525 F.2d at 893. In the case before us, the district court referred the complaint to the magistrate. Under 28 U.S.C.A. §636(b)(1)(B) (West Supp. 1978), a district judge may refer prisoner petitions challenging conditions of confinement to a magistrate. In these cases, a magistrate is authorized "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any [pretrial] motion." *Id.* Such motions include motions "for judgment on the pleadings, for summary judgment, [and] to dismiss for failure to state a claim upon which relief can be granted." 28 U.S.C.A. §636(b)(1)(A) (West Supp.1978). The statute does not exempt magistrates from the Federal Rules of Civil Procedure, however.

[12, 13] The district court may dismiss the complaint if it is frivolous or malicious. 28 U.S.C. §1915(d) (1970). A dismissal of a pro se complaint for failure to state a cause of action should be without prejudice, however, so that the inmate may file an amended complaint within a reasonable time.

Hines v. Wainwright, 539 F.2d 433, 434 (5th Cir. 1976). Further, in civil rights litigation challenging the conditions of confinement under section 1983, a prisoner is not obligated to exhaust state administrative remedies. *E. g., Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 1830, 1840-41, 36 L.Ed.2d 439 (1973); *Hardwick v. Ault.*

[14] Because of the nature of this type of litigation, the district court may find it advantageous to require the defendant to submit a special report to aid in the management of the case. *Hardwick v. Ault.* As we stated above, however, the report, especially an unverified statement such as the one in issue here, cannot constitute a substitute for the type of proof required by the Federal Rules of Civil Procedure as a predicate for the summary disposition of a case. The magistrate below used the report as his source for findings of fact. Resolution of claims by such a method has been consistently condemned. *E. g., Scott v. Estelle*, 567 F.2d 632 (5th Cir. 1978); *Ballard v. Spradley*, 557 F.2d 476 (5th Cir. 1977); *Rasberry v. Spradling*, 558 F.2d 257 (5th Cir. 1977). Of course, had the report conformed to the requirements of Fed.R.Civ.P. 56, the district court could have relied on it in reaching summary judgment. Since it did not, the only recognized pleading before the district court was the inmates' complaint. Because on its face this complaint does state a claim upon which relief could be granted, we vacate the district court's dismissal and remand this cause for further proceedings consistent with this opinion and the Federal Rules of Civil Procedure.

VACATED and REMANDED.

APPENDIX A

JOHNNY MICHELLI
VERSUS

CIVIL ACTION
NUMBER 74-296

C. MURRAY HENDERSON, WARDEN
LOUISIANA STATE PENITENTIARY

E. GORDON WEST, District Judge.

This case, brought by the plaintiff, an inmate at Louisiana State Penitentiary, was referred by the Court to the United States Magistrate for his investigation, report and recommendation. The Report of the Magistrate, dated November 25, 1974, has been received and filed in the record of this case, and an independent review of this record by the Court leads to the conclusion that no evidentiary hearing is required in this matter. For the reasons stated in the Magistrate's Report:

IT IS ORDERED that this case be, and it is hereby DISMISSED, reserving to the plaintiff his right to apply to the Court in the future, if necessary, after having exhausted the administrative remedies available to him at the Louisiana State Penitentiary.

APPENDIX B

MAGISTRATE'S REPORT

This suit was filed by Johnny Michelli, an inmate at the Louisiana State Penitentiary at Angola, Louisiana, against C. Murray Henderson, the Warden of the prison. Petitioner filed this suit pursuant to 42 U.S.C. 1983.

In the complaint filed herein, petitioner alleges that he is in immediate need of hospitalization, and although certain doctors at the Louisiana State Penitentiary Hospital have recommended that he be hospitalized, the chief medical officer at the Louisiana State Penitentiary, Dr. H. M. Katz, has refused to allow petitioner to be hospitalized. Petitioner, therefore, seeks to have this Court issue an order compelling the defendant to have petitioner examined by a disinterested doctor.

On September 30, 1974, the Louisiana Department of Corrections issued a memorandum setting forth certain procedures for resolving inmate problems at the Louisiana State Penitentiary at Angola, Louisiana. A copy of this memorandum is attached to this report.

These procedures were adopted after numerous discussions between representatives of the Louisiana Department of Corrections and the United States Magistrate for the Middle District of Louisiana. The regulations as set forth by the Louisiana Department of Corrections basically follow Policy Statement Number 2001.6 issued by the

United States Bureau of Prisons on February 14, 1974, which was entitled "Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities."

The purpose of adopting the procedures for resolving inmate problems both at the Louisiana State Penitentiary at Angola and in the federal prisons was to set up procedures by which inmates could seek formal review of complaints which relate to their imprisonment. This Court believes, as do the representatives of the Louisiana Department of Corrections, that most complaints can be resolved quickly and efficiently through direct contact with the staff who are responsible in the particular area of the problem complained of by the inmate. If the inmate is unable to resolve his problem at the staff level, or if the complaint is of a sensitive nature, the inmate has the right to set forth his complaint in a written statement to the Louisiana Department of Corrections. After the complaint is received by the Louisiana Department of Corrections, the matter will be investigated by an impartial staff of penologists who shall submit a report to the Director in order to allow her to render her decision within 30 days of the date of filing the complaint.

A review of the complaint filed by the petitioner in this case clearly shows that he has failed to exhaust these remedies available to him at the Louisiana State Penitentiary. The Fifth Circuit Court of Appeals has on a number of occasions stated that where there are administrative remedies available to prisoners, the inmate should first exhaust the proper administrative channels

before presenting his grievance for judicial review. *Jones v. Carlson*, 495 F.2d 209 (5 Cir. 1974); *Thompson v. United States, Federal Prison Industries*, 429 F.2d 1082 (5 Cir. 1974); *Paden v. United States*, which is cited with approval by the Fifth Circuit in *Jones v. Carlson*, supra, the Fifth Circuit Court of Appeals stated:

> "In the administration of federal prisons primary responsibility for supervision is delegated by statute to the Bureau of Prisons under the direction of the Attorney General, 18 U.S.C. § 4001 and 4042. Under that authority the Bureau has promulgated rules and regulations for the proper administration of the various prisons and has established effective means to review actions taken by local prison officials. *Green v. United States*, 283 F.2d 687 (3 Cir. 1960). In line with these regulations, grievances of prisoners concerning prison administration should be presented to the Bureau through the available administrati[ve] channels. Only after such remedies are exhausted will the court entertain the application for relief in an appropriate case."

The reasoning set forth by the Fifth Circuit Court of Appeals insofar as administrative rules apply to federal prisons should equally apply to administrative remedies afforded inmates by the state prisons.

It is the opinion of this Court that the state inmate in a state prison should be afforded the same rights and remedies afforded the federal inmate and federal prison for solving internal problems at the level having the most direct contact with the offender. Furthermore, such a procedure provides a means of continuous review of the administrative decisions and policies and provides a

written record in the event there is a subsequent judicial review. More important, such a procedure allows a complaint to be resolved quickly and efficiently without undue delay.

In the case now before the Court the petitioner states that some prison doctors have indicated he should be hospitalized but these doctors' recommendations have been rejected by the prison's chief medical officer. The inmate seeks a review of the decision rendered by the chief medical officer. It is this Court's opinion that this case is clearly an example of a case that should first be reviewed at the staff level of the Louisiana State Penitentiary and, if necessary, by the Director of the Department of Corrections before there is any judicial intervention in this matter.

Therefore, for the above reasons it is my recommendation that petitioner's suit should be dismissed for failure to exhaust the appropriate and available administrative remedies afforded him by the Louisiana State Penitentiary at Angola, Louisiana, reserving to him the right to proceed in this Court if necessary after he has exhausted those available remedies.

Baton Rouge, Louisiana, this 25th day of November, 1974.

(s) Frank J. Polozola
UNITED STATES MAGISTRATE

APPENDIX C

MEMORANDUM

TO: All Persons in the Custody of the Department of Corrections

FROM: Elayn Hunt, Director

DATE: September 30, 1974

SUBJECT: Procedures for Resolving Inmate/Student Problems

The purpose of this memorandum is to formally notify you of the procedures you should follow in seeking review of any complaints you may have during your confinement.

I

INSTITUTIONAL REVIEW. Most complaints can be resolved quickly and efficiently through direct contact with staff who are responsible in the particular area of the problem. Therefore, inmates and students should first seek assistance from the officials at their institutions (this could be a classification officer, dormitory officer, chaplin, superintendent, etc.).

II

REVIEW BY DIRECTOR. If the problem has not been resolved satisfactorily after exhausting the appropriate institutional channels, the inmate/student may then write the Director. The letter should clearly state the problem to be resolved. Ordinarily, the complaint must be filed within thirty days from the date the problem arose.

If an inmate's complaint is of a sensitive nature, and he believes he could be unfavorably affected if

it is known at the institution that he is making the complaint, he may file it directly with the Director. In such cases, he must clearly explain a valid reason for not seeking review within the institution.

Complaints may be sent in sealed envelopes to: Elayn Hunt, Director, Louisiana Department of Corrections, P. O. Box 44304, Capitol Station, Baton Rouge, Louisiana 70804.

The Director, or her representative, will notify the inmate of her decision within thirty days, excluding weekends, and holidays, after receiving the complaint. [Whenever possible, a decision will be reached in a shorter period of time. However, because of the shortage of staff and because of the many other matters which must be dealt with daily, it is not always possible to do the necessary investigating in less than thirty days.]

III

EXCEPTIONS. Nothing in this memorandum should be construed to affect in any way the procedures outlined in the Disciplinary Procedures of each institution, including the right to appeal decisions of the Disciplinary Board to the Director.

It should be clearly understood that the Director welcomes and encourages any inmate or student who wishes to air his views or make any suggestions or recommendations whatever to forward them as usual to the Director in a sealed envelope.

Elayn Hunt
Director

APPENDIX D

STATE OF LOUISIANA
DEPARTMENT OF CORRECTIONS

ADULT
RULES, REGULATIONS
AND
DISCIPLINARY PROCEDURES

PREFACE

This booklet of disciplinary rules and procedures constitutes clear and proper notice for every adult prisoner within the Louisiana Department of Corrections.

This booklet is effective January 1, 1977, and supercedes any and all conflicting disciplinary rules and procedures at any facility in which adult prisoners of the Department are confined.

FOREWARD

Discipline, internal and external, and work are necessary for an individual to function within society and for society to function. In order for our corrections society to function, the following disciplinary rules and procedures have been adopted. They must be followed at all adult facilities within the Department of Corrections.

These rules and procedures can only be amended by the Secretary of the Department of Corrections.

In the event of a genuine emergency, such as a serious disturbance disrupting norman operations or a natural disaster, the Secretary or his designee may suspend any and all disciplinary rules and procedures for the duration of the emergency.

Good time not earned during a given month (up to 25 days) CANNOT BE RESTORED. There is no provision in law enabling anyone, including the Secretary or the Governor, to restore good time.

The pronouns "he" and "his," as they appear herein, are used for convenience only and are not intended to discriminate against female employees or female prisoners.

January 1, 1977

DISCIPLINARY DEFINITIONS

ADMINISTRATIVE LOCKDOWN (ADM. LD.): A holding area, preferably a cell, where prisoners who present an immediate threat to the security of the facility through a specific act of planned or committed misbehavior are confined pending their appearance before the Disciplinary Board.

APPEALS: An appeal to the Disciplinary Board may be made by a prisoner who is dissatisfied with

the handling of his case by the Disciplinary Officer. An appeal to the Secretary may be made by or on behalf of a prisoner who is dissatisfied with the handling of his case by the Disciplinary Board.

CONFIDENTIAL INFORMANTS: Persons who secretly provide employees with information concerning misbehavior or planned misbehavior by prisoners and/or employees.

COUNSEL AND COUNSEL SUBSTITUTES: Counsel is an attorney at law of the prisoner's choice who must be paid by the prisoner. Counsel substitutes are paralegals, usually prisoners, who aid and assist, without cost, an accused prisoner in the preparation and presentation of his defense and/or appeal. The aid of counsel and counsel substitute can only be had for cases which appear before the Disciplinary Board or are appealed to the Secretary.

DISCIPLINARY BOARD: A committee composed of three ranking employees whose duty is to provide fair and impartial hearings for prisoners accused of serious misbehavior.

DISCIPLINARY OFFICER: A ranking employee whose duty is to provide fair and impartial hearings for prisoners accused of minor misbehavior, and to transfer prisoners requesting protection to suitable quarters.

DISCIPLINARY REPORT: A report on the approved form filed by an employee who has reason to believe, of his own knowledge, that a prisoner(s) has violated one or more disciplinary rules. Disciplinary Reports are heard by the Disciplinary Officer or by the Disciplinary Board.

EXTENDED LOCKDOWN: Maximum security area for confining prisoners who have been found guilty of serious misbehavior or who require protective custody.

HEARINGS: Prisoners accused of misbehavior are heard by the Disciplinary Officer or by the Disciplinary Board.

INCIDENT REPORT: A report on the approved form filed by an employee describing a specific instance of planned or committed misbehavior. This report is filed when the information is obtained through sources other than the reporting employee's first hand knowledge — sources such as confidential informants, other prisoners, non-employees, etc. Incident Reports are heard by the Disciplinary Board.

INVESTIGATION REPORT: A report submitted for appropriate disposition to the Disciplinary Board by an Investigative Officer detailing the facts and evidence uncovered in an investigation.

INVESTIGATIVE OFFICER: An experienced (preferably senior) employee assigned by the Disciplinary Board or by a ranking employee to investigate a Disciplinary Report, Incident Report or any matter felt to be worthy of investigation.

ISOLATION: A punitive holding area, preferably a cell, where prisoners are confined temporarily in a totally restricted situation after being so sentenced by the Disciplinary Board.

POSTED POLICY: As used herein, applies to policy memorandums detailing what behavior is required or forbidden regarding the individual needs of the facility — such as, count procedure, off-limits areas, ID Card policy, cash money policy, etc.

REHEARINGS: A case heard by the Disciplinary Board may be reheard by the Disciplinary Board at their discretion, or when so ordered by an appropriate official. A Rehearing is a full hearing and does not differ from a Hearing.

***

DISCIPLINARY PROCEDURES

ADMINISTRATIVE LOCKDOWN GUIDELINES: Prisoners accused of serious misbehavior present an immediate threat to the security of the facility and, with the approval of the Shift Major or senior security officer on duty, may be placed in Adm. Ld. until their Disciplinary Board hearing. The approving Shift Major or senior security officer must ensure that the report describes an Adm. Ld. offense. The Disciplinary Board must dismiss the charges against prisoners who are placed into Adm. Ld. in violation of these guidelines.

DISCIPLINARY REPORT FOR:

#1 CONTRABAND — only for possession of a weapon, controlled dangerous substance, store-bought alcohol, or manufacture of alcohol
#3 CRIME AGAINST NATURE
#5 DEFIANCE
#7 DISOBEDIENCE, AGGRAVATED
#10 ESCAPE
#11 FAVORITISM — only involving force or threats
#12 FIGHTING
#13 FIGHTING, AGGRAVATED
#15 INTOXICATION — only until he sobers up
#17 PROPERTY DESTRUCTION — only willful destruction
#20 SELF MUTILATION
#21 THEFT — only serious incidents
#22 THEFT, ATTEMPTED — only serious incidents

INCIDENT REPORT FOR: Escape, Violence, Threats of Violence, Strongarming, Theft, Smuggling of Contraband

ALSO: Upon WRITTEN REQUEST, a prisoner may be placed in Adm. Ld. for his own protection until the Disciplinary Officer can transfer him to suitable quarters.

Pending possible transfer to another facility, prisoners may be held in Adm. Ld.

EXCEPT AS STIPULATED ABOVE, NO PRISONER MAY BE PLACED IN ADM. LD.

APPEALS TO THE DISCIPLINARY BOARD: A prisoner who wishes to appeal a case heard by the Disciplinary Officer ("Low Court") must appeal to the Disciplinary Board ("High Court"). As soon as the sentence is passed, the prisoner who wants to appeal must clearly say so to the Disciplinary Officer who will then automatically suspend the sentence and schedule the case for the next meeting of the Disciplinary Board.

APPEALS TO THE SECRETARY: A prisoner who wishes to appeal a case heard by the Disciplinary Board must appeal to the Secretary. The Board may suspend the sentence pending appeal, if they so desire. The prisoner may appeal himself or through his counsel or counsel substitute. Appeals must be clearly written, preferably typed, on regular size paper (8½ x 11") and contain the following information:

1. Simple heading — "Appeal From The Disciplinary Board"

2. **Full name** and number of appealing prisoner(s)
3. Date report was written
4. Rule number and/or charge found guilty of
5. Original charge, if it was reduced
6. Date case was heard by the Board
7. Chairman and Members of the Board, if known
8. Sentence imposed, and whether it was suspended
9. Whether prisoner pled guilty or not guilty
10. State in clear, simple language grounds for reversal
11. State in clear, simple language arguments for reversal
12. State inclear, simple language what relief is desired
13. Full name, number, and location of counsel substitute, if he is filing the appeal
14. Date appeal is filed
15. Copy of report should be attached, if possible, along with any other evidence favorable to the appeal

All statements of fact should be double checked before mailing, as false statements, knowingly made, are a violation of Rule #6 (Disobedience). Appeals must be filed within seven (7) days of the Disciplinary Board action.

COUNSEL SUBSTITUTES: Behavior of Counsel Substitutes and/or Legal Aid Office workers must be above reproach; a job change is mandatory following conviction of a serious offense. Counsel Substitutes are not required to file appeals; but, when they do not wish to, they must so inform the prisoner who wants his case appealed stating why not and explain to him, if necessary, the instructions for filing an appeal.

DISCIPLINARY BOARD: A committee composed of at least three supervisory level employees, one each from Security, Treatment, and Administration. Two of the three elements constitutes a quorum, and decisions must be made by majority vote. The Chairman must be a Warden, Associate or Deputy Warden, or Division Head (such as Work Release Supervisor, Classification Director, Vocational Supervisor, etc.). Board Members must be supervisory employees, such as Security Captain, Classification Officer II or III, Records Custodian, Psychologist I, etc.

DISCIPLINARY OFFICER: A ranking security officer (at least a C.O. IV) who conducts hearings of minor violations and who may impose only minor penalties. At these hearings, the accused represents himself and is given full opportunity to speak in his behalf, but the presence of counsel substitutes, witnesses, or the accuser is not permitted. These hearings are not taped. The Disciplinary Officer also hears prisoners **who have signed written requests for protection,** determines appropriate quarters to which they can be transferred, and transfers them (includes transfers to maximum security, when necessary).

EXTENDED LOCKDOWN: No prisoner can be placed in extended lockdown for any reason unless he has been afforded a full hearing before the Disciplinary Board and was found guilty of violating one or more serious rules, or of being dangerous to himself or to others, or of being a serious escape risk, or of being in need of protection, or of being the subject of an investigation conducted by non-institutional authorities concerning a serious

felony. The exception is when a prisoner who has signed a written request for protection is transferred there by the Disciplinary Officer. Prisoners in extended lockdown will be reviewed by an appropriate review board for possible release to a lesser custody status at least every ninety (90) days.

HEARINGS — DISCIPLINARY BOARD: The accused prisoner must be given a written copy of the charges against him — a copy of the Disciplinary Report or the Incident Report — at least twenty four (24) hours before the hearing begins:

Before the hearing begins, the accused prisoners must have their rights read to them. These rights are:

1. The right to present evidence and witnesses in his behalf, provided it is not repetitious and is relevant
2. The right to counsel or counsel substitute
3. The right to remain silent, and that anything he does say may be used against him then or at later proceedings
4. The right to confront and cross examine his accuser, unless the accuser is a confidential informant
5. The right to an oral summary of the evidence and the reasons for the judgment
6. The right to a written summary of the evidence and the reasons for the judgment, provided a plea of not guilty was entered
7. The right to a finalized copy of the report, upon written request
8. The right to request a rehearing
9. The right to appeal to the Secretary within seven (7) days of the Board action (the hearing)

Conduct of the Hearing: Disciplinary Board hearings must be tape recorded **in their entirety,** and the tapes preserved for a period of thirty (30) days. When the prisoner intends to appeal to the courts, he should write to the Secretary asking that the tape be preserved for possible court review. Hearings must be conducted as follows:

1. The accused enters his name and number into the record — the tape — as does his counsel or counsel substitute, if any. The accused confirms that he has been read his rights and that he understands them.
2. The Chairman reads the Disciplinary Report and/or Incident Report to the accused and asks for his plea. Available pleas are:
   (a) Not Guilty
   (b) Not Guilty with a Statement
   (c) Guilty
   (d) Guilty with a Statement

   Should the accused enter no plea, or attempt to enter a plea not listed above, the Chairman will enter a plea of Not Guilty and proceed with the case, giving the accused full opportunity to present his entire defense.
3. Motions, if any, by the defense should now be made. Such motions may be:
   (a) To Dismiss
   (b) For a Continuance (must be granted upon a showing of good cause; i.e., to summon witnesses or the accuser, when accused has not received adequate written notice 24 hours before the hearing, or upon any other showing of good cause)
   (c) To Conduct an Investigation (must be granted upon a showing of a need for such)
   (d) Any other appropriate motions

4. The Board will rule on motions at the appropriate time.
5. After entering his plea, the accused may then present his defense. The Board may then ask relevant questions of the accused, his witnesses, and/or his accuser. The accused may remain silent if he so desires; in any event, no prisoner can be compelled to incriminate himself.
6. Everyone except the Board Members, the Bailiff, and any official observers must then leave the room and the Board will deliberate and decide the case on the basis of the evidence presented. Official observers must not take part in the hearing or in the deliberations. The accused's record cannot be examined to determine guilt or innocence. The accused's record may be examined following a finding of or a plea of guilty in order to discover a pattern of similar behavior. The accused may wish to enter his record into evidence; in this case, it may be examined at any time after the request. As a rule, the record may only be examined for help in determining an appropriate sentence.
7. Following the deliberation, the Board Chairman must give the accused an oral summary of the evidence and reasons for the judgment. He will announce the verdict and the sentence. The Board has the authority to suspend any sentence that it imposes, including suspending the sentence pending appeal. The Chairman will restate to the accused that he has the right to appeal to the Secretary within seven (7) days.

Prisoners must be heard by the Board within seventy two (72) hours of placement in Adm. Ld. When it is not possible to provide a full hearing

within 72 hours, the accused must be brought before the Board and informed of the reasons for the delay, and be remanded back to Adm. Ld. after a date for the full hearing has been set. Holidays, genuine emergencies, or good faith efforts by the administration to provide a timely hearing are the only exceptions. Otherwise valid reports must be dismissed by the Board on this basis alone.

Hearings of Disciplinary Reports: Before the hearing begins, the Board **must** change the rule number to match the description of alleged misbehavior, if necessary, and grant a continuance, if requested.

Hearings of Incident Reports: When the report consists of information obtained from confidential informants, it must be corroborated by witnesses, by the record, or by other evidence. A Security Representative may testify regarding the substance of the information and the reasons why he believes the information and the informant(s) are reliable. Testimony of the Security Representative must be corroborated by witnesses, by the record, or by other evidence. In order for the Security Representative to attest to the reliability of the information received from a confidential informant, the informant must have been reliable in the past and must have first hand knowledge of the present incident(s). The Security Representative is the accuser and may be cross examined by the defense, upon request.

When the report is based on information from a

prisoner who does not wish to remain anonymous, he may be summoned and cross examined by

The Board must exercise caution in cases based solely upon one prisoner accusing another, an information thus obtained is a poor substitute for first hand testimony by employees.

When prisoners are found guilty on the basis of Incident Reports, they have been found guilty of either being "Physically Dangerous to Themselves or to Others" or of being "A Threat to the Security of the Facility," through the specific incident described. Rule number or definitions have nothing to do with Incident Reports.